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No. 86-353

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Second Circuit

PETITIONER'S SUPPLEMENTAL AND REPLY MEMORANDUM

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Petitioner Consolidated Rail Corporation ("Conrail") files this supplemental and reply memorandum to address the response to its petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit ("Conrail Petition") and the amicus brief in support of the petition by the National Railway Labor Conference ("NRLC"). The memorandum also addresses other developments that occurred since the petition was filed on September 2, 1986, which may affect the Court's consideration of the petition.

1. *Public Law No. 99-431.* On September 30, 1986, President Reagan signed into law a joint resolution adopted by Congress (a copy of which is set forth beginning at page A-1), to resolve the primary labor dispute between respondents Brotherhood of Maintenance of Way Employes, *et al* ("BMWE" or "Union") and the Maine Central Railroad and Portland Terminal Company, which dispute had led to the economic pressure on Conrail that forms the basis for this case. In a case growing out of the same primary labor dispute and similar economic pressure, *Burlington Northern Railroad Company v. Brotherhood of Maintenance Way Employes* (U.S. No. 86-39) ("*Burlington*"), both petitioner and respondent addressed the question of whether the enactment of Public Law No. 99-431 rendered that case moot. Both parties contended the case was not moot because the underlying dispute was one "capable of repetition, yet evading review", citing *inter alia*, *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 125 (1974). On October 8, 1986 the Court granted certiorari in *Burlington*.

Conrail submits that the same reasons advanced in No. 86-39 as to the effect of Public Law No. 99-431 on the petition apply in the instant case. The same primary labor dispute is involved and, although the type and character of union pressure in the instant case make it different from *Burlington* (discussed *infra*), the same observations as to the brevity of strikes, their likelihood to recur and their effect on complete judical review apply here, and warrant granting Conrail's petition. This same view was expressed in the Amicus Brief of the NRLC (p. 6 n.2).[1]

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1. Additionally, the claim for damages incurred because of respondents' unlawful action makes this case not moot. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957); *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435, 442 (1984).

2. *The Granting of a Writ of Certiorari in Burlington.* Respondent BMWE stated in a letter to the Clerk dated October 3, 1986, that "issues raised in Conrail's petition are related to those presented to this Court in [*Burlington*]" and that because the Union already had responded to the *Burlington* petition, the Union waived its right to respond to Conrail's petition. Amicus NRLC urged the court to also grant certiorari in this case, as well as in *Burlington*, and coordinate their handling.

Conrail agrees with amicus NRLC that the Court should hear the instant case with *Burlington*, because the facts and issues presented here are in certain material respects different from those presented in *Burlington*, and reviewing both cases will help the Court deal comprehensively with Railway Labor Act ("RLA") regulation of secondary union pressure: both "stranger" picketing as implicated in both cases, and the related but equally important question of Union-ordered strikes on a neutral carrier in the absence of stranger picketing, presented only in the instant case.[2] The Seventh Circuit's decision in *Burlington* focused only on secondary picketing, *Burlington N. R. R. v. BMWE*, 793 F.2d 795, 798-800 (7th Cir. 1986), and assumed all relevant RLA dispute resolution procedures had been exhausted, *id.* at 799, while noting the continuing viability of this Court's decisions accommodating the anti-injunction provisions of the Norris LaGuardia Act to enforcement of the RLA's dispute resolution procedures. *Id.* at 801. In *Burlington*, the railroads were facing only secondary picketing. *Id.* at 797.

The Conrail facts are quite different. The threatened Union pressure was not only secondary picketing, but also Union-ordered strikes by Conrail employees whom

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2. *See, e.g., Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) (review granted in related cases stemming from the same incident but presenting different questions).

the Union also represents but who were not involved in the Union's exhaustion of the RLA major dispute procedures with Maine Central (Conrail Petition at 4-5, B-1). These threats were acted upon after the Court of Appeals for the Second Circuit stayed the district court's injunction; strikes and picketing broke out across the Conrail system, even in the absence of stranger (Maine Central) pickets (Conrail Petition at 6-7). Thus, the Conrail petition allows the Court to consider whether a union which exhausts RLA dispute resolution procedures with one carrier can order strikes by employees on a neutral carrier with which no RLA dispute procedures have been pursued. As discussed in the petition, the judgment below conflicts with this Court's decisions consistently construing and accommodating the Norris-LaGuardia Act to enforce compliance with the RLA's dispute resolution procedures. (Conrail Petition at 12-14).

3. *Application of the RLA Dispute Resolution Procedures.* Respondents' incorporation here of their reply to the petition in *Burlington* underscores the untenability of their assertion that, once the RLA's major dispute procedures on one carrier are exhausted, a union may engage in unlimited economic warfare because the Federal courts have been taken out of the labor injunction business by the Norris-LaGuardia Act. Brief of Respondents BMWE in Support of the Petition for a Writ of Certiorari in *Burlington*, at 9. As Conrail's petition shows, (Conrail Petition at 12-14) the respondents paint with too broad a brush. The Court consistently has ruled that the nation's labor laws must be read together, to give vitality to the essential values in each, and to promote the peaceful techniques of negotiation, mediation, and arbitration to resolve labor disputes.[3] This was recently reaffirmed

3. *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970); *Brotherhood of R.R. Trainmen v. Chicago R. & I.R.R.*, 353 U.S. 38, 40 (1957) *Chicago & N.W.R.R. v. United Transp. Union*, 402 U.S. 570, 585-87 (1971); *United States v. Hutcheson*, 312 U.S. 219 (1941).

in *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702, 709 (1982).

The Court also has recognized consistently that refusal by labor or management to confer and negotiate is a prolific cause of industrial strife, and merits judicial notice. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 n. 11 (1981), citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937); *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515 (1937). Conferences and negotiation in labor disputes is mandated out of a belief that collective discussions, backed by potential use of economic weapons, will yield decisions that are better for labor and management, and for society as a whole. *First Nat'l Maintenance Corp., supra*, 452 U.S. at 678. The railroad industry's peculiar place in our economy and legal system has warranted a higher standard in this respect than industry generally. *Id.* at 687 n.23.

Respondents would excuse application of these settled principles when a union exhausts its negotiation duty with the primary carrier, even where, as in this case, the Union's secondary pressure goes beyond mere picketing to include strikes of neutral carriers where no conferences have been held. As shown in the petition, Conrail submits that this distinction is without legal foundation. It is of no consequence that the duty under the RLA to confer, negotiate and mediate over the use of some forms of secondary pressure may be "vague," as the Court of Appeals believed (Conrail Petition at A-5). This Court has enforced even vague duties to negotiate where union economic pressure under the RLA would be limited. *Chicago & N.W. R.R. v. United Transp. Union*, 402 U.S. 570, 583 (1971).

Moreover, the drafters of the Norris LaGuardia Act, which does not distinguish among the forms of economic pressure, intended that RLA dispute procedures should be enforced by injunction, *see* 75 Cong. Rec. 5505-04 (1932); *Burlington N. R.R. v. BMWE, supra*, 793 F.2d at 798-99, and the legislative history of the RLA supports

finding a duty to confer over all disputes, whether or not they arise in the proximate employment relationship.[4] Enforcement of this duty is all the more compelling given Congress' admonition against construing the RLA as making all strikes legal once dispute procedures are exhausted, *Texas & N.O. Ry. v. Brotherhood of Ry. Clerks*, 281 U.S. 548, 566 n.3 (1930), citing S. Rep. No. 222, 69th Cong., 1st Sess. (1926), and this Court's ruling that the RLA's dispute resolution duties are to be favored over the Norris LaGuardia Act's earlier, more general provisions. *Chicago & N.W.R.R. v. United Transp. Union, supra*, 402 U.S. at 582 n.18.

It is ahistorical to suggest that the RLA dispute procedures do not apply at least to that aspect of the dispute between Conrail and its employees represented by the BMWE; it has long been common practice for labor and management to negotiate over employee responses to stranger disputes that affect the neutral workplace.[5] The railroad's incentives in such conferences are the same as

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4. Compare H.R. Rep. No. 328, 69th Cong., lst Sess. (1926); Hearings before the Sen. Comm. on Interstate & Foreign Commerce on S. 2036, 69th Cong. lst Sess. 44, 67-68, 92 (1926); and Hearings before the House Comm. on Interstate & Foreign Commerce on H.R. 7180, 69th Cong. lst Sess. 67-68, 87-88 (1926) (RLA is industry-wide system of self-government for the resolution of all labor disputes).

5. *See, e.g.*, 2 Collective Bargaining Negot. & Cont. (BNA) 77:l-375 (1986) (discussing frequency of clauses regulating responses to picketing, handling of struck-work, sympathy strikes and related matter). Rail collective bargaining over neutral employee responses to strikes on other railroads dates back at least to 1893. *In re Lennon*, 166 U.S. 548 (1897); *Waterhouse v. Comer*, 55 F. 149 (C.C.W.D. Ga. 1893). *See also Local 1395, IBEW v. NLRB*, No. 85-1164 (D.C. Cir. Aug. 8, 1986) (reviewing "settled principles" of no-strike and picket-line clauses under the National Labor Relations Act); *Trans Int'l Airlines, Inc. v. International Bd. of Teamsters*, 650 F.2d 949 (9th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981) (discussing similar issues under the Railway Labor Act); *Northwest Air Lines, Inc. v. Airline Pilots Ass'n*, 442 F.2d 246 (8th Cir. 1970) *aff'd*, 442 F.2d 251 (8th Cir.), *cert. denied*, 404 U.S. 871 (1971) (same).

any employer's: reach an accommodation so as to minimize disruption to its operations. The decision below accepted the Union's formulation that no RLA duties apply to such disputes. Certiorari should be granted to allow the Court to review this important aspect of the RLA's channeling of economic forces, (*Brotherhood of R.R. Trainmen v. Chicago R. & I.R.R.*, 353 U.S. 30, 41 (1957)) as well as the secondary picketing issues raised in *Burlington* and this case.

CONCLUSION

For the foregoing reasons, and for the reasons stated both in Conrail's petition and the Amicus Brief of the NRLC, the Writ of Certiorari should be granted, and consideration coordinated with the Court's scheduling of *Burlington Northern Railroad Co. v. BMWE*, No. 86-39.

Respectfully submitted,

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APPENDIX A

S.J. Res. 415 99th Cong., 2d Sess. (1986) follows:

Whereas the labor dispute between the common rail carriers, Maine Central Railroad Company and Portland Terminal Company, and certain of the employees of such carriers represented by the Brotherhood of Maintenance of Way Employees threatens essential transportation services of the Nation;

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained;

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers;

Whereas the President by Executive Order no. 12557 of May 16, 1986, pursuant to the provisions of section 10 of the Railway Labor Act (45 U.S.C. 160), created a Presidential Emergency Board to investigate the dispute and report findings;

Whereas the recommendations of Presidential Emergency Board No. 209 for settlement of such dispute have not yet resulted in a settlement;

Whereas the extension of the provisions of section 10 of the Railway Labor Act (45 U.S.C. 160) for an additional 60-day period to such dispute provided by the joint resolution entitled "Joint Resolution to provide for a temporary prohibition of strikes or lockouts with respect to the Maine Central Railroad Company and the Portland Terminal Company labor-management dispute", approved August 21, 1986 (Public Law 99-385), has not yet resulted in a settlement of such dispute;

Whereas the advisory board established pursuant to section 2 of such joint resolution recommended that in the event that the parties to the dispute were unable to reach agreement on the dispute before September 13, 1986, the Congress should enact legislation directing the

parties to accept and apply the recommendations of Emergency Board No. 209, and if such parties are unable to agree as to all necessary details in applying the recommendations of such Emergency Board, all such unsettled issues should be submitted to final and binding arbitration;

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not yet resulted in settlement of the dispute;

Whereas the Congress, under the Commerce Clause of the Constitution, has the authority and responsibility to ensure the uninterrupted operation of essential transportation services; and

Whereas the Congress in the past has enacted legislation for such purposes: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

That the following conditions shall apply to the dispute referred to in Executive Order No. 12557 of May 16, 1986, between the common rail carriers, Maine Central Railroad Company and Portland Terminal Company (hereafter in this resolution referred to as the "carriers") and the employees of such carriers represented by the Brotherhood of Maintenance of Way Employees.

(1) The parties to such dispute shall take all necessary steps to restore or preserve the conditions out of which such dispute arose as such conditions existed before 12:01 ante meridiem of March 3, 1986, except as provided in paragraphs (2) through (4).

(2) The report and recommendations of Presidential Emergency Board No. 209 shall be binding on the parties and shall have the same effect as though arrived at by agreement of the parties under

the Railway Labor Act (45 U.S.C. 151 et seq.), except that nothing in this joint resolution shall prevent a mutual written agreement by the parties to any terms and conditions different from those established by this joint resolution.

(3)(A) If there are unresolved implementing issues remaining with respect to the report and recommendations or agreement under paragraph (2) after 10 days after the date of the enactment of this joint resolution, the parties to the dispute shall enter into binding arbitration to provide for a resolution of such issues.

(B) The National Mediation Board established by section 4 of the Railway Labor Act (45 U.S.C. 154) shall appoint an arbitrator to resolve the issues described in subparagraph (A). Except as provided in this joint resolution, such arbitration shall be conducted as if it were under section 7 of such Act, and any award of such arbitration shall be enforceable as if under section 9 of such Act.

(1) Within 30 days after the date of the enactment of this joint resolution, the binding arbitration entered into pursuant to paragraph (3) shall be completed.